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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 STEVEN MCCOY and LITA MCCOY,
11 husband and wife,

12 Plaintiffs,

13 v.

14 LIBERTY MUTUAL FIRE
15 INSURANCE COMPANY,

16 Defendant.

CASE NO. C09-5464BHS

ORDER DENYING
PLAINTIFFS' MOTION TO
REMAND AND GRANTING
MOTION TO AMEND.

17 This matter comes before the Court on Plaintiffs' motion to remand (Dkt. 5) and
18 Plaintiffs' motion to amend complaint (Dkt. 8). The Court, having considered the
19 pleadings filed in support of and in opposition to these motions and the remainder of the
20 file, denies Plaintiffs' motions for the reasons stated herein.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 This matter arises out of an auto insurance dispute. Plaintiffs are residents of the
23 State of Washington. Dkt. 8, attachment 1 at 1. Plaintiffs purchased an automobile
24 insurance policy from Defendant, which included \$100,000 in under insured motorist
25 coverage. Dkt. 6 at 2.
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1 Steven McCoy was injured in an automobile accident involving an under insured
2 motorist. *Id.* Plaintiffs obtained settlement from the under insured motorist's insurance in
3 the amount of the policy limit, \$25,000. *Id.*

4 Plaintiffs then filed a claim with Defendant under their under insured motorist
5 policy. Defendant offered a settlement, which Plaintiffs refused. Dkt. 5 (Declaration of
6 Plaintiffs' attorney at 3). Defendant declined to arbitrate the matter. Dkt. 10 at 2.

7 On July 1, 2009, Plaintiffs filed a complaint for damages against Defendant in
8 Cowlitz County Superior Court. Dkt. 1, attachment 1 at 14. Plaintiffs allege that the
9 amount offered by Defendant was insufficient and request judgment against Defendant in
10 the amount of \$125,000, which reflects the under insured motorist's policy limit of
11 \$25,000 and the \$100,000 limit that Plaintiffs purchased from Defendant. *Id.* at 16.

12 On July 29, 2009, Defendant filed notice of removal from Cowlitz County
13 Superior Court to United States District Court for the Western District of Washington.
14 Dkt 1 (notice of removal) at 1. This removal was based on diversity of citizenship. *Id.* at
15 2.

16 On August 7, 2009, Plaintiffs filed a motion for remand to state court. Dkt. 5. On
17 August 31, 2009, Defendant filed a response in opposition to Plaintiffs' motion. Dkt. 10.
18 On September 3, 2009, Plaintiffs filed a reply to Defendant's response. Dkt. 12. The
19 parties disagree as to whether removal was proper in this case. Additionally, on August
20 27, 2009, Plaintiffs filed a motion to amend their complaint. Dkt. 8. Defendant opposed
21 this motion in its responsive pleading filed August 31, 2009.

22 The Court finds these motions to be related and rules on them together as
23 discussed herein.

24 25 26 **II. DISCUSSION**

27 **A. Motion to Remand**

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1 **1. Removal Jurisdiction**

2 The removal statute, 28 U.S.C. § 1441, provides that “any civil action brought in a
3 State court of which the district courts of the United States have original jurisdiction, may
4 be removed by the defendant or defendants, to the district court of the United States for
5 any district . . . where such action is pending.”The proper procedure for challenging
6 removal to federal court is a motion to remand. A federal court must order remand if there
7 is any defect which causes federal jurisdiction to fail, or if there is any defect in the
8 removal procedure. 28 U.S.C. § 1447©). The removal statutes are construed restrictively,
9 and any doubts about removal are resolved in favor of remanding the case to state court.
10 *Gaus v. Miles. Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). On a motion to remand, the
11 removing defendant faces a strong presumption against removal, and bears the burden of
12 establishing that removal was proper by a preponderance of evidence. *Id.* at 567; *Sanchez*
13 *v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996). One instance in which
14 the district courts of the United States have “original jurisdiction” is where there is
15 complete diversity between the parties and the amount in controversy exceeds \$75,000.
16 28 U.S.C. § 1332(a)(1).

17 **a. Diversity of Citizenship**

18 To establish citizenship for diversity purposes, a corporation is a citizen of the
19 state where it is incorporated and of the state where it has its principal place of business.
20 28 U.S.C. § 1332©); *see also Indus. Tectonics, Inc. V. Aero Alloy*, 912 F.2d 1090, 1092
21 (9th Cir. 1990). “The party asserting jurisdiction has the burden of proving all
22 jurisdictional facts.” *Indus. Tectonics*, 912 F.2d at 1092 (citations omitted).

23 Here, Defendant asserts and Plaintiffs do not disagree that Defendant is
24 incorporated in Wisconsin. *See* Dkt. 10 at 5. Because Defendant can show it is
25 incorporated in another state, it will establish diversity of citizenship if it can also
26 establish that its principle place of business is not in Washington.

1 Defendant claims its principle place of business is in Massachusetts. Dkt. 10 at 5.
2 *See generally* Dkt. 5 and 12. Plaintiffs do not contend otherwise, but merely assert that
3 Defendant has an office in Cowlitz county.

4 Generally, federal courts utilize one of two tests when determining a corporation's
5 principal place of business. *Indus. Tectonics*, 912 F.2d at 1092 (citation omitted):

6 Under the "nerve center test," developed in *Scot Typewriter Co. V.*
7 *Underwood Corp.*, 170 F. Supp 862, 865 (S.D.N.Y. 1959), a corporation's
8 principal place of business is where its executive and administrative
9 functions are performed. Under the "place of operations test," developed in
10 *Inland Rubber Corp. V. Triple A Tire Service, Inc.*, 220 F. Supp. 490, 496
11 (S.D.N.Y. 1963), the principal place of business is the state which "contains
12 a substantial predominance of corporate operations." *See Co-Efficient*
13 *Energy Systems v. CSL Industries*, 812 F.2d 556, 558 (9th Cir. 1987).

14 *Id.* at 1092-93. Notably, a corporation, by qualifying to do business in a state and by
15 consenting to be sued in the courts of that state, does not thereby become a citizen of that
16 state for diversity purposes, nor does it waive its right to a removal to the federal court.

17 *Terral v. Burke Construction Co.* 257 U.S. 529, 532, 42 S. Ct. 188, 66 L. Ed. 352 (1922).

18 Plaintiffs contend, however, that this matter is a direct action as contemplated
19 under 28 U.S.C. § 1332(c)(1). Dkt. 5 at 2. This statute provides, in relevant part, as
20 follows:

21 [I]n any direct action against the insurer of a policy or contract of liability
22 insurance, whether incorporated or unincorporated, to which action the
23 insured is not joined as a party-defendant, such insurer shall be deemed a
24 citizen of the State of which the insured is a citizen

25 This statute does not have application to the instant case. The Ninth Circuit has expressed
26 that

27 [t]his portion of s 1332©) was enacted in 1964 *specifically* to eliminate
28 diversity jurisdiction tort claims in which both the injured party and the
tortfeasor are local residents but which, under state "direct action" statutes, are brought
against the tortfeasor's foreign insurance carrier without joining the tortfeasor as a
defendant. Courts have uniformly defined the term "direct action" as used in this section
as those cases in which a party suffering injuries or damage for which another is legally
responsible is entitled to bring suit against the other's liability insurer without joining the
insured or first obtaining a judgment against him. Thus, "unless the cause of action urged
against the insurance company is of such a nature that the liability sought to be imposed
could be imposed against the insured, the action is not a direct action.

1 *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 901-02 (9th Cir. 1982) (emphasis
2 added) (citations omitted). In *Beckham*, the Court concluded that the matter did not
3 involve a “direct action” because Beckham (the insured) was seeking to impose liability
4 on Safeco for its own tortious conduct, i.e., refusing to settle her claim against a third
5 party. The Court held, “[t]he district court thus did not err in concluding that diversity
6 jurisdiction existed in this case. *Id.* at 902.

7 Similarly, here, Plaintiffs are attempting to impose liability on their own insurance
8 company for failure to settle a claim they have, which arises out of a third party’s (the
9 uninsured motorist’s) tortious conduct. In other words, this is simply not the type of case
10 contemplated by the “direct action” proviso in 28 U.S.C. § 1332(c)(1), as the liability that
11 the Plaintiffs seek to impose against their insurance company could not possibly be
12 imposed against the Plaintiffs themselves. To find otherwise would defy logic.

13 Here, the Court finds no reason to conclude that Defendant’s principal place of
14 business is in Washington – county where insurance is sold hardly qualifies Defendant as
15 a citizen of Washington under either of the tests articulated by the Ninth Circuit in *Indus.*
16 *Tectonics*. Therefore, the Court concludes that diversity of citizenship exists between the
17 parties. As such, jurisdiction will be found proper under 28 U.S.C. § 1332©) if the
18 amount in controversy requirement is met.

19 **b. Amount in Controversy**

20 The removing defendant bears the burden of establishing federal jurisdiction,
21 including any applicable amount in controversy. *Abrego Abrego v. The Dow Chemical*
22 *Co.*, 443 F.3d 676, 682-83 (9th Cir. 2006). Where the complaint specifies the amount of
23 damages sought, the removing defendant may rely on the complaint to establish that the
24 amount in controversy exceeds the sum or value of \$75,000. *See Sanchez*, 102 F.3d at
25 404.

26 Here, it is evident from the face of the complaint that the amount in controversy is
27 \$75,000 or greater. *See* (Dkt. 1, attachment 1 at 16). Therefore, Defendant relying on the
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1 information contained in the complaint has met its burden in establishing the requisite
2 amount in controversy.

3 **2. Forum Non Conveniens**

4 Where a court has jurisdiction under 28 U.S.C. § 1332, the procedure for remand
5 after removal is guided by 28 U.S.C. § 1447©). A motion to remand the case must be
6 based on some defect other than lack of subject matter jurisdiction. 28 U.S.C. § 1447©).
7 Plaintiffs assert no defect here, and the Court finds no defect present in Defendant's
8 removal.

9 Here, pursuant to 28 U.S.C. § 1332(a)(1), the Court has jurisdiction. Plaintiffs
10 provide no authority to the contrary. Nonetheless, Plaintiffs request the Court to order
11 remand pursuant to 28 U.S.C. § 1441(e)(6) (*forum non conveniens*). Dkt. 5 at 2. This
12 statute is not applicable to motions to remand where the federal district court has
13 jurisdiction. A change of venue request based on convenience of the parties and witnesses
14 is controlled by 28 U.S.C. § 1404. But this statute is also inapplicable in the instant
15 matter.

16 Therefore, Plaintiffs' motion to remand is denied because the Court has
17 jurisdiction based on diversity of citizenship and there was no defect in Defendant's
18 removal.

19 **B. Motion to Amend Pleadings**

20 Pursuant to Fed. R. Civ. P. 15(a)(2), Plaintiffs request leave to amend the
21 complaint. Where an answer has been filed, Plaintiffs must either secure the opposing
22 party's consent or leave from the court to amend the complaint. Fed. R. Civ. P.
23 15(a)(1)(B), (a)(2). Here, Defendant filed an answer to the complaint (Dkt. 6) and does
24 not consent to Plaintiffs' request to amend the complaint. *See* Dkt. Plaintiffs intend to
25 amend the complaint to add the following claims: (1) damages and contract benefits; (2)
26 consumer protection violation;(3) bad faith in handling of claim; and (4) violation of the
27 Insurance Fair Conduct Act. Dkt. 8, attachment 1 (proposed amended complaint).

1 Because these claims appear to be colorable, the Court grants Plaintiffs leave to
2 amend the complaint.

3 **C. Attorney Fees**

4 Because Plaintiffs' motion to remand is denied, Plaintiffs' request for attorney fees
5 is also denied.

6 **III. ORDER**

7 Therefore, it is hereby **ORDERED** that

8 **(1) Plaintiffs' motion to remand (Dkt. 5) is DENIED;**

9 **(2) Plaintiffs' motion to amend the complaint (Dkt. 8) is GRANTED; and**

10 **(3) Plaintiffs' request for attorney fees is DENIED.**

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12 DATED this 23rd day of September, 2009.

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16 BENJAMIN H. SETTLE
17 United States District Judge
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